

CIMB BANK BHD v. PANARON CONTROL SDN BHD

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COURT OF APPEAL, PUTRAJAYA
ABDUL WAHAB PATAIL JCA
HAMID SULTAN ABU BACKER JCA
VARGHESE GEORGE JCA
[CIVIL APPEAL NO: Q-02-1397-06-2012]
25 NOVEMBER 2014

B

BANKING: Banker and customer – Forgery – Forgery of company cheques – Forged cheques honoured by bank – Irregular transactions of cheques – Whether bank liable for conversion of customer’s monies – Whether customer negligently contributed to forgery – Scope and extent of defence available to bank under s. 73A of Bills of Exchange Act 1949 – Whether bank could avail defence

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The appellant/defendant (‘bank’) was a commercial bank operating a branch at Bintulu and where the respondent/plaintiff maintained a current account (‘the bank account’). The plaintiff’s action was essentially premised on the allegation that the bank had unlawfully and/or without mandate or authority honoured forged cheques drawn on the plaintiff’s bank account thereby causing loss to and/or conversion of the plaintiff’s monies. The plaintiff sought recovery of sums wrongfully debited from the bank account. The plaintiff was a Kuala Lumpur based company with an office in Bintulu manned by a single-staff, namely, a manager (‘the manager’) overseeing all its administrative and financial matters. The manager had forged the plaintiff’s directors’ signatures on some 196 cheques drawn on the plaintiff’s account with the bank over a period of four years. The plaintiff detected some discrepancies within the monthly bank statements in or about November 2005. This had been raised with the bank. However, the bank only reverted in August 2006 with the series of plaintiff’s prior monthly bank statements that had been requested for. Apparently, only thereafter did the plaintiff realise that they had been furnished with doctored monthly bank statements all during that period by their office at Bintulu. The doctored monthly statements had cleverly disguised the unauthorised payments made out from the bank account. The trial judge (‘judge’) found that ‘the bank had failed to maintain a proper system or protocol of examining and/or verifying the authenticity to weed out cheques that bear non-mandated company chops’. The judge further held that the bank could not avail of the defence available under s. 73A of the Bills of Exchange Act 1949 (‘s. 73A’). The bank had contended by way of defence that the plaintiff had, by their acts or omission, knowingly or negligently contributed to the complained forgery or the making of the unauthorised signatures. The bank appealed against the decision of the High Court. The following issues arose for determination in the appeal: (i) whether the judge’s finding that the signatures on the impugned 196 cheques was a forgery was sustainable on the evidence and in law; and (ii) whether the judge had correctly interpreted the scope and extent of the defence available to the bank under s. 73A.

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A Held (allowing appeal)**Per Varghese George JCA delivering the judgment of the court:**

- B** (1) The finding of the judge based on a comparison of the disputed signature with admitted documents was sufficient to conclude on a balance of probabilities that all the 196 impugned cheques were forgeries and the bank ought not to have honoured any of them for payment from the plaintiff's account. (para 46)
- C** (2) The judge was clearly in error both on the law and on an objective evaluation of the facts to hold that the bank could not avail itself to the defence, namely of 'knowingly or negligently' contributing to the forgery as was available under s. 73A. Under s. 73A, the bank need only show that it had honoured the cheques in good faith. (paras 48 & 53)
- D** (3) The manager was left to solely manage the Bintulu office and had been given custody of the cheque books and to receive the monthly bank statements from the plaintiff. There was no doubt that the presence of even a single accounts clerk or other personnel at the Bintulu branch would have been an effective check against the manager's excesses, as occurred here to the detriment of the plaintiff. The monthly bank statements sent by the bank was required to be addressed to the Bintulu office only. The plaintiff ought to have required the monthly bank statements to be sent to their main office instead to safeguard its financial position knowing fully well that there was no other staff except the manager in Bintulu. This blatant gap in the control or administrative set up of the plaintiff left a ripe opportunity for the manager to orchestrate and carry out that fraud on the plaintiff. (paras 66 & 67)
- E**
- F** (4) The plaintiff had, in December 2005, discovered some discrepancy in respect of the operation of their account held with the bank. Yet the plaintiff did not put a stop to the operations immediately and commence investigations on their own earlier when there was a hint of possible irregularity. This failure on the part of the plaintiff to protect its own interest resulted in a further 59 forged cheques (within the 196 cheques) to be fraudulently encashed for a further eight months up to August 2006. The plaintiff had always the paramount duty to adequately protect its funds with the bank from being wrongfully taken out. It was not justifiable at all to shift the blame and just ignore the consequences despite being put on alert to such an irregularity. The plaintiff obviously had failed to practice proper oversight and prudence with respect to their financial affairs. (paras 68 & 70)
- G**
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- I** (5) The negligent conduct, as exemplified by the omissions of the plaintiff, was the direct cause that contributed to the 'forgeries' of the impugned cheques drawn on the plaintiff's account with bank. The plaintiff had fallen victim to a fraud of its own employee. Section 73A was intended

to protect the bank in such instances. The trial court ought to have held that the bank had established a sufficient defence to the plaintiff's claims within the purview of s. 73A and dismissed the action. (paras 72 & 74)

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Bahasa Malaysia Translation Of Headnotes

Perayu/defendan ('bank') adalah bank komersial yang beroperasi sebagai cawangan di Bintulu dan di mana responden/plaintif mempunyai akaun semasa ('akaun bank'). Tindakan plaintif pada asasnya berdasarkan dakwaan bahawa bank telah secara salah dan/atau tanpa mandat atau kuasa menunaikan cek-cek yang dipalsukan dikeluarkan daripada akaun bank plaintif dengan itu mengakibatkan kerugian kepada dan/atau penukaran wang plaintif. Plaintif memohon untuk mendapatkan semula jumlah yang dikeluarkan daripada akaun bank tersebut. Plaintif adalah syarikat yang terletak di Kuala Lumpur dengan pejabat di Bintulu diuruskan oleh satu-satunya pekerja, iaitu seorang pengurus ('pengurus tersebut') yang menguruskan kesemua perkara-perkara berkaitan pentadbiran dan kewangan. Pengurus tersebut telah memalsukan tandatangan pengarah-pengarah plaintif pada kira-kira 196 cek yang ditunaikan daripada akaun plaintif dengan bank tersebut bagi tempoh sepanjang empat tahun. Plaintif mengesan beberapa percanggahan dalam penyata bulanan bank dalam atau sekitar November 2005. Perkara ini telah dibangkitkan kepada bank. Walau bagaimanapun, bank hanya menjawab pada bulan Ogos 2006 dengan rantaian penyata bulanan bank yang terdahulu yang diminta. Jelas, hanya selepas itu plaintif menyedari bahawa mereka telah diberikan penyata bulanan bank yang telah dipalsukan sepanjang tempoh tersebut oleh pejabat mereka di Bintulu. Penyata bulanan yang dipalsukan tersebut telah secara bijak mengaburi bayaran-bayaran keluar yang tidak dibenarkan daripada akaun bank tersebut. Hakim bicara ('hakim') mendapati bahawa 'bank telah gagal mengekalkan sistem atau protokol yang wajar untuk memeriksa dan/atau mengesahkan kebenaran untuk mengeluarkan cek-cek yang mempunyai cop syarikat yang tidak diberi mandat'. Hakim juga selanjutnya memutuskan bahawa bank tersebut tidak boleh mengguna pakai pembelaan yang sedia ada di bawah s. 73A Akta Bil Pertukaran 1949 ('s. 73A'). Dalam pembelaannya, bank menghujahkan bahawa plaintif telah, melalui tindakan atau peninggalannya, mengetahui atau menyumbang secara cuai kepada pemalsuan yang diadukan atau dalam penandatanganan yang tidak dibenarkan. Bank merayu terhadap keputusan Mahkamah Tinggi. Isu-isu berikut telah berbangkit untuk dipertimbangkan dalam rayuan: (i) sama ada dapatan hakim bahawa tandatangan-tandatangan pada 196 cek yang dipersoalkan adalah pemalsuan boleh dikekalkan atas keterangan dan di sisi undang-undang; dan (ii) sama ada hakim, dengan sebetulnya, telah menafsirkan skop dan peringkat pembelaan yang sedia ada untuk bank di bawah s. 73A

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A Diputuskan (membenarkan rayuan)**Oleh Varghese George HMR menyampaikan penghakiman mahkamah:**

- B** (1) Dapatan hakim berdasarkan perbandingan tandatangan yang dipertikaikan dengan dokumen-dokumen yang dikemukakan adalah mencukupi untuk memutuskan, atas imbalan kebarangkalian, bahawa kesemua 196 cek yang dipersoalkan tersebut adalah dipalsukan dan bank tidak sepatutnya menunaikan mana-mana daripadanya untuk bayaran daripada akaun plaintif.
- C** (2) Hakim jelas khilaf dari segi undang-undang dan atas penilaian objektif fakta untuk memutuskan bahawa bank tidak boleh mengguna pakai pembelaan, iaitu 'dengan pengetahuan atau secara cuai' menyumbang kepada pemalsuan seperti yang sedia ada di bawah s. 73A. Di bawah s. 73A, bank hanya perlu menunjukkan bahawa ia telah menunaikan cek dengan suci hati.
- D** (3) Pengurus tersebut dibiarkan menguruskan pejabat Bintulu seorang diri dan telah diberikan jagaan buku cek dan untuk menerima penyata bulanan bank daripada plaintif. Tidak diragui bahawa kehadiran walau seorang kerani akaun atau pekerja lain di cawangan Bintulu akan mengimbangi penyalahgunaan kuasa oleh pengurus, seperti yang berlaku di sini sehingga merugikan plaintif. Penyata bulanan bank yang dihantar oleh bank diminta dialamatkan hanya ke pejabat Bintulu sahaja. Plaintif sepatutnya meminta penyata bulanan bank dihantar ke ibu pejabat mereka untuk melindungi kedudukan kewangan, mengetahui penuh bahawa tidak ada pekerja lain kecuali pengurus tersebut di Bintulu. Jurang yang jelas dalam kawalan atau pentadbiran syarikat plaintif meninggalkan peluang keemasan untuk pengurus tersebut merancang dan melaksanakan penipuan terhadap plaintif.
- E**
- F**
- G** (4) Plaintif telah, pada Disember 2005, mendapati beberapa percanggahan berkaitan dengan operasi akaun mereka dengan bank tersebut. Tetapi plaintif tidak menghentikan operasi dengan serta merta dan memulakan penyiasatan sendiri sebelum itu apabila terdapat tanda-tanda kemungkinan ketidakaturan. Kegagalan pihak plaintif untuk melindungi kepentingannya sendiri mengakibatkan pemalsuan lanjut 59 keping cek (terangkum dalam 196 cek) ditunaikan secara penipuan bagi tempoh lapan bulan seterusnya sehingga Ogos 2006. Plaintif sentiasa mempunyai kewajipan utama untuk melindungi dengan secukupnya dananya dengan bank daripada dikeluarkan secara salah. Adalah tidak wajar langsung untuk memindahkan kesalahan dan tidak mengendahkan akibatnya walaupun setelah mendapat amaran mengenai ketidakaturan tersebut. Plaintif jelas telah gagal melaksanakan pengawasan dan kebijakan yang sewajarnya berkaitan dengan urusan kewangan mereka.
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- (5) Tindakan cuai tersebut, seperti yang ditunjukkan melalui peninggalan oleh plaintif, adalah sebab langsung yang menyumbang kepada 'pemalsuan' cek-cek yang dipersoalkan yang ditunaikan dari akaun plaintif dengan bank. Plaintif telah menjadi mangsa penipuan pekerjajanya sendiri. Seksyen 73A diniatkan untuk melindungi bank dalam keadaan sedemikian. Mahkamah bicara sepatutnya memutuskan bahawa bank telah membuktikan pembelaan yang mencukupi bagi tuntutan-tuntutan plaintif dalam ruang lingkup s. 73A dan menolak tindakan tersebut.

Case(s) referred to:

- Formosa Resort Properties Sdn Bhd v. Bank Bumiputera Malaysia Berhad* [2007] 1 LNS 686 HC (*refd*)
- Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2010] 6 CLJ 530 CA (*refd*)
- Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad* [2011] 1 LNS 414 HC (*refd*)
- Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 CA (*refd*)
- Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2012] 6 CLJ 423 HC (*refd*)
- Leolaris (M) Sdn Bhd v. Malayan Banking Bhd* (unreported) (*refd*)
- Leolaris (M) Sdn Bhd v. RHB Bank Bhd* [2009] 10 CLJ 248 HC (*refd*)
- Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd* [2012] 4 CLJ 997 HC (*refd*)
- Melewar Apex Sdn Bhd v. Malayan Banking Bhd* [2007] 8 CLJ 579 HC (*refd*)
- Prima Nova Sdn Bhd v. Affin Bank Bhd* [2014] 9 CLJ 442 CA (*refd*)
- Principal Salute (M) Sdn Bhd v. RHB Bank Bhd* [2010] 5 CLJ 819 HC (*refd*)
- Public Bank Bhd v. Anuar Hong & Ong* [2005] 1 CLJ 289 HC (*refd*)
- RHB Bank v. L & R Holdings Sdn Bhd & Anor* [2011] 4 CLJ 369 CA (*refd*)
- Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors* [1985] 2 All ER 947 (*refd*)
- United Asian Bank Bhd v. Thai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31 SC (*refd*)

Legislation referred to:

Bills of Exchange Act 1949, ss. 24, 73A, 95
Evidence Act 1950, s. 73(1)

For the appellant - Allan Lao (Lidwina Kiew with him); M/s David Allan, Sagah & Teng Advocs

For the respondent - Satinder Singh Sandhu (Musa Dinggat with him); M/s Musa Dinggat Advocs

[Editor's note: For the High Court judgment, please see *Panaron Control Sdn Bhd v. CIMB Bank Bhd & Third Party* [2013] 10 CLJ 534.]

Reported by Amutha Suppayah

A

JUDGMENT**Varghese George JCA:****Introduction**

B [1] The appeal before us was from a decision of the High Court at Bintulu which had allowed the plaintiff's claim against the defendant.

The appellant/defendant was a commercial bank operating a branch at Bintulu and where the respondent/plaintiff maintained a current account (No: 1106-0010193057)(bank account).

C [2] The respondent's/plaintiff's action was essentially premised on the allegation that the appellant/defendant had unlawfully and/or without mandate or authority honoured forged cheques drawn on the respondent's/plaintiff's bank account thereby causing loss to and/or conversion of respondent's/plaintiff's monies. The respondent/plaintiff sought for recovery of those sums wrongfully debited from their current account.

D [3] After having considered the submission of the respective counsels for the parties, we had on 14 November 2013 set aside the orders of the High Court.

E In this grounds now issued for our decision, the appellant/defendant will be referred to as the bank, while respondent/plaintiff as just the plaintiff, to best capture the factual context in which the controversy between the parties had arisen.

Background

F [4] The plaintiff was a Kuala Lumpur based company with an office in Bintulu manned by a single-staff, namely, a manager overseeing all its administrative and financial matters. The manager at the material time of the impugned transactions was one Altar Roland anak James Nyandang ('AR').

G [5] The bank account was opened in 2001 and in the related plaintiff's company resolution of 19 May 2001, it was provided that the bank account would be operated on the following mandate:

(a) By the signatures of any two of the following for drawing of amounts not exceeding RM3,000:

- H (i) Clair Sawat Mai @ Anne Mai (Director C)
(ii) Nik Roslizaini binti Nik Abdullah (Director N)
(iii) AR

I (b) By the signatures of both the following for drawing of amounts in excess of RM3,000:

- (i) Director C
(ii) Director N

[6] An imprint of the plaintiff's rubber stamp/chop, ostensibly to be used on the cheques to be drawn by the plaintiff, was affixed at the bottom of the plaintiff's company resolution. However there was no specific requirement stated that such affixed rubber stamp/chop would constitute part of the mandate for clearance of cheques. A

[7] Following the aforesaid plaintiff's company resolution, the bank had obtained on its standard specimen signature cards, the signatures (separately, that is) of Director C, Director N and AR. Similar specimen signatures were also provided by the three signatories on the bank's signature scanner form. B

[8] The plaintiff's rubber stamp/chop was however included for in the signature scanner form (termed by the learned trial judge as the 'mandated company chop') and this was in the following manner: C

Panaron Control Sdn Bhd
Co. No. 471527-V

...

Authorised Signatures D

[9] The complaint of the plaintiff was that some 196 cheques (the suit originally cited 206 cheques) drawn on the plaintiff's account with the bank had been honoured and paid out (individually for sums below RM3,000) when at least one of the two signatures thereon was forged and was not signed by either Director C or Director N. E

[10] During the later stages of the trial, a further point taken by the plaintiff was that there were noticeable discrepancies in the so called 'mandated company chop' used and affixed to the impugned cheques and accordingly in this regard too the cheques were also alleged to have been wrongly honoured by the bank as they lacked authority for the monies paid out of the bank account. F

[11] Another ancillary complaint mounted by the plaintiff was that there had been unauthorised alteration made to a 'cheque-book requisition slip' which had resulted in three cheque-books being issued when only two had been requested for. It was alleged that the bank had failed to ensure that the alteration found on the requisition slip was duly verified or authenticated, which if done, it was contended, could have prevented the forgeries or fraud perpetrated on the plaintiff. G H

[12] The drawing of the alleged 196 (206) forged cheques had spanned over a four years period (2002 to 2006). The plaintiff, admittedly had detected some discrepancies within the monthly bank statements in or about November 2005. This had been raised with the bank. However, the bank only reverted in August 2006 with the series of plaintiff's prior monthly bank statements that had been requested for. I

A [13] Apparently, only thereafter did the plaintiff realise that they had been furnished with doctored monthly bank statements all during that period by their office at Bintulu. This doctored monthly statements had cleverly disguised the unauthorised payments made out from the bank account.

B [14] Although it was not established on evidence who had perpetrated the forgery of the cheques and the alteration of the cheque book requisition slip, strong suspicion was focussed on AR, who had since absconded from his employment with the plaintiff and was not traceable at the time of the trial. All of the cheques where one of the signatures was alleged to be forged were for amounts less than RM3,000 each and made out in the name of AR or for 'cash' collected by AR.

C [15] The bank had commenced third party proceedings in this action against AR (and had proceeded to enter judgment in default on the said third party action against AR).

D **Decision Of The High Court**

E [16] The first principal finding of the learned trial judge was that the bank had "... acted on a 'forged and non-existent mandate and authority' by accepting the non-mandated company chops to clear payment of the forged cheque ..." and that by this lapse "... the defendant (bank) had failed to maintain a proper system or protocol of examining and/or verifying the authenticity to weed out cheques that bear non-mandated company chops".

[17] In this respect, it was highlighted in the judgment that the chop used on all forged cheques differed from the mandated company chop in that:

- F (i) The forged cheques issued between 14 October 2002 and 22 February 2004 carried full stops after the words 'Sdn' and 'Bhd' when the specimen chop in the signature scanner form did not have such full stops; and
- G (ii) The forged cheques issued between 23 February 2004 to 28 June 2006 did not have a hyphen between the figures '471527' and 'V' while such hyphen existed in the mandated specimen chop.

H [18] Despite the bank's objection that this issue had not been specifically raised in the pleadings by the plaintiff, the learned judge was of the view that the particulars of the bank's negligence set out at paras. 14.1 to 14.6 of the statement of claim was wide enough to accommodate this as a 'fact in issue' notwithstanding that it only surfaced as an issue for determination, late in the trial. It was the learned judge's reasoning that the term 'signature' in s. 24 of the Bills of Exchange Act 1949, could be interpreted to include a mandated rubber stamp/chop and this was consistent with local banking practice which required such rubber stamp/chop to be used too where the account was operated by a corporate entity.

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[19] The learned judge also dismissed the bank's contention that there was evidence of different company chops with variations being used by the plaintiff. It was held that if the company rubber stamp/chop affixed on a cheque drawn on the bank account did not conform strictly with the 'mandated rubber stamp', then such cheque with the differing rubber stamp/chop ought to have been rejected by the bank.

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[20] The second principal finding of the learned trial judge was that upon the court itself checking upon the signatures alleged to be forged and from the evidence elicited under cross-examination of DW2 to DW18 (the witnesses for the bank), as to the existence of discrepancies in the specific characteristics or features of the alleged forged signatures of Director C or Director N (that is, when compared with the specimen signatures provided), those signatures on the impugned cheques were on a balance of probabilities forged.

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According to the learned judge it was not a case of the signatures being signed differently from time to time.

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[21] In this respect, the plaintiff had originally attempted to introduce an expert witness report through a gazetted document examiner (PW4) who had studied and analysed the disputed signatures. This report was however not accepted by the court and ruled to be a 'bare expression of opinion'. This was because PW4 had failed to compare it with the specimen signature cards and/or the signature scanner form which was the authoritative sample signatures of the plaintiff's authorised signatories; PW4 had also failed, according to the learned judge, to give any reason why this was not done.

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[22] Nonetheless, the learned judge had then proceeded to undertake an independent examination of the alleged forged signatures before arriving at the finding stated earlier. Here, the learned judge dealt extensively with the testimony of the bank's own witnesses (DW2 to DW18) and stated that the comparisons revealed that the signature of Director N in 192 cheques attributed to have been signed by her were in all probability, forgeries; this coincided in any event with the conclusion of PW4 in the expert report which had not been admitted.

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With respect to the cheques attributed to have been signed by Director C, notwithstanding that PW4's conclusion was somewhat neutral, namely, that those signatures "may have been written by her", the learned judge was inclined to differ and went on to hold that they '... are obviously different from the specimen signature even by a cursory examination of a non-expert'.

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[23] The court in undertaking the above independent investigation of its own had however cautioned against merely accepting the self-serving evidence of Director N (PW1) and Director C (PW2) (who had denied that the impugned respective signatures had been written by them). The learned

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A judge also noted that the bank on its part had also failed to adduce any evidence to counter the allegation that respective signatures of Director N and Director C, on the cheques in question were 'forgeries', in any event.

[24] On the bank's contention that no two signatures by the same person would turn out identical each time and that there would be slight variations as between those signatures the learned judge's conclusion was as summarised in the following excerpts from the judgment:

C This is not the usual case that it had been signed differently by Director N and Director C as envisaged by the *Formosa Resort Properties* case (*supra*) but rather that there are subtle and obvious differences and discrepancies that are at variance from the norm even from the layman's point of view. These differences and variances in all the forged cheques noted on them and now admitted to by DW2 to DW18 during cross examination should have put these banking counter staff on guard. The Court finds that it is their duty on such a discovery to raise a query to the signatory whether she signed the cheque and not to the other signatory before them in whose favour the cheque was to be paid to. This is akin to asking the wolf whether it is alright to release the sheep to his custody. This appears not to have been done at all for all 206 forged cheques to the detriment of the Plaintiff.

E It is a judgmental call made by DW2 to DW18 which is part of their job and claiming to be untrained for the job to verify signatures is no excuse to be lax or negligent in spotting the discrepancies in the signature before them. This is different from imposing the standard of an expert on them to ferret out good forgeries, which is not the case here as DW2 to DW18 admitted under cross examination that there were obvious differences and discrepancies to be found in the signatures they had cleared as good. F The Court finds that the failure of the Defendant's counter staff to check with the signatory on discovery of the obvious variations and discrepancies in the signatures of Director N and Director C had allowed the forged cheques to be cleared.

G [25] Further down in the judgment, it was also observed by the learned judge as follows:

H However from the cross examination of the defence witnesses DW2 – DW18, it appears to the Court that it is the lack of bank officers with sharp eyes and front counter staff who ignored variations and discrepancies that had allowed the high volume of forged cheques to be cleared. The Court accepts that even if such front counter staff are not trained expert document examiner, they must nonetheless being held out for such a job have some degree of training for the task and professionalism in being responsible [*sic*] for their judgmental call in verifying signatures as genuine especially an unvarying mandated rubber stamp.

I By the volume of the forged cheques here, the Court can only but conclude that DW2 – DW 18 were totally inept in the performance of their duties of verifying the signature and the mandated chop to be used.

They had cleared the forged cheques in the face of the variations and discrepancies in the forged signatures and the non mandated chops as highlighted in cross examination and admitted by them. ... Their failure to question and to take further instruction and confirmation from the signatory when faced with such discrepancies by saying in their “untrained” or laymen’s eye the forged signatures and the non mandated chops look the same to them is not excusable when it is their job to spot forgeries.

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The learned judge’s finding was therefore that the plaintiff had proven on a balance of probabilities that one of the two signatures was a ‘forgery’ in all instances.

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[26] The third principal finding of the learned judge was that the alteration in the cheque-book request slip (to read ‘3’ for the original written ‘2’) had to be signed/countersigned by the authorised mandated signatories to validate the same in similar manner as was required in case of other bank documents, including cheques. According to the learned judge this had been conceded to be a requirement by the bank’s witnesses DW1 and DW9. The court was of the view that any such unauthenticated request (as evident in this case) ought to have been rejected.

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[27] It was the learned judge’s finding that the careless release of the third cheque book by the bank to AR had enabled him to commit forgery to effect the unauthorised drawings on the bank account.

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[28] The fourth principal conclusion reached by the learned judge was that the bank could not avail of the defence available under s. 73A of the Bills of Exchange Act 1949 (“BEA 1949”). The bank had contended by way of defence to the plaintiff’s action on the alleged forged cheques, that the plaintiff had by their acts or omission knowingly or negligently contributed to the complained forgery or the making of the unauthorised signatures.

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[29] It was the learned judge’s finding that the plaintiff’s “... management set up was sufficient to supervise ...” AR at the Bintulu office and that through the evidence of PW1, PW2 and PW6 it had been established that “... the plaintiff had a control system for monitoring the cheques and the bank statement of accounts”.

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[30] The learned judge while accepting that the ‘terms and conditions of operating a current account’ applicable in this case required the plaintiff to check the monthly bank statement (forwarded by the bank), and to immediately report any inaccuracies, nevertheless held that it was the plaintiff’s “... inability to get hold of the genuine statements to check that had caused the non-reporting ...” of such errors to the bank.

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- A [31] With respect to the further stipulation in the bank's terms and condition of operating a current account (paras. 2.13.2) to the effect that if no objection or complaint was received within 14 days of the date of such monthly bank statement, the balance and transaction stated therein would be deemed accurate, the learned judge noted as follows:
- B The said Terms and Condition were accepted by the Plaintiff when it signed the Application Form ... to open their current account with ..." the Bank.
- C [32] While accepting that such a duty could be created and imposed upon the plaintiff through contract, the learned judge (citing the Privy Council decision in the *Tai Hing Cotton Mill Ltd v. Liu Chong Bank Ltd & Ors* [1985] 2 All ER 947) was of the view that such a term was insufficient to constitute a 'conclusive evidence clause'. Furthermore, the learned judge noted that:
- D ... on the evidence adduced it has not been shown by the Defendant (Bank) that the burden of the obligation and sanction imposed was brought home to the Plaintiff, like all public exemption clauses in a standard Terms and Conditions document... a customer would not be bound if he was never specifically forewarned of its effect.
- E [33] The aforesaid conclusions reached by the learned judge was notwithstanding the decisions of the courts in *Public Bank Bhd v. Anuar Hong & Ong* [2005] 1 CLJ 289 and *RHB Bank v. L & R Holdings Sdn Bhd & Anor* [2011] 4 CLJ 369 cited by the bank in support of their contention that post the introduction of s. 73A to BEA 1949, the customer of a bank had been imposed with a more onerous duty to exercise vigilance over the conduct of their bank account including verifying promptly the monthly bank statements and having in place proper control systems to deter forgeries as well as to detect any fraud early, if it should occur.
- F

The Bank's Appeal

- G [34] The first contention of the bank was that there was no credible material before the trial court to come to the conclusion that one of the two signatures on the impugned cheques was a forgery. The learned judge having correctly rejected the expert opinion/report of PW4 could not have concluded, it was submitted, that the one signature was a 'forgery' based, admittedly, only on a ' cursory checking' by the court, of the impugned cheques.
- H It was argued that what was before us on appeal was a case where there was insufficient appreciation or assessment of evidence and therefore appellate interference was justified (*Lee Ing Chin & Ors v. Gan Yook Chin & Anor* [2003] 2 CLJ 19 CA) to correct the error committed by the learned judge.
- I [35] In so far as the discrepancies in the plaintiff's rubber stamp used on the cheques and which was held by the court amounted to breach of the mandate of the plaintiff, it was submitted that the plaintiff's 'rubber stamp' to be affixed on the cheques would not constitute a 'signature' within the

meaning of s. 24 of the BEA 1949. Wrongful use of the form of 'rubber stamp' as an alleged breach of mandate had not in any case been pleaded by the plaintiff and the emphasis placed by learned judge in His Lordship's judgment to this aspect of evidence was misdirected and misplaced.

[36] Perhaps the principal thrust of the bank's appeal was however that the learned judge had misappreciated the fact that manifestly there was a defective control system within the operation of the plaintiff itself, which had failed to detect the forged 196 cheques drawn on the plaintiff's bank account over a period of four years (2002 to 2006). Further the plaintiff had failed to immediately review its administrative controls and put in place adequate safeguard even when in December 2005 it had noticed irregularities in the operations of its bank account.

In this regard, it was submitted, that the learned judge had misdirected himself as well on the law as to the scope of the complete defence available to the bank pursuant to s. 73A of the BEA 1949 on account of the established evidence of the plaintiff's own negligence in the matter.

Plaintiff's Response

[37] In reply it was the plaintiff's submission that the learned trial judge (having disregarded PW4 evidence) had taken the correct approach to examine the impugned cheques individually for discrepancies and variances before coming to the conclusion that one of the two signatures were indeed forgeries on a balance of probabilities. (*Formosa Resort Properties Sdn Bhd v. Bank Bumiputera Malaysia Berhad* [2007] 1 LNS 686; *Principal Salute (M) Sdn Bhd v. RHB Bank Bhd* [2010] 5 CLJ 819; *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31).

[38] It was also contended that the finding that a non-mandated company-chop had been used and such rubber-stamp cop constituted a 'signature' which had to be verified too by the bank, could not be defaulted particularly based on the evidence of the bank's own witness DW18.

[39] In the circumstances, it was argued that it was the bank who had wrongly and negligently allowed payment based on the 196 forged cheques and even in acting on the amended and unverified cheque-book requisition slip. The learned trial judge was therefore correct in concluding that the bank had acted on forged and non-existent mandate or authority and such findings of facts based on evidence should not be easily reversed by an appellate court.

[40] Further it was submitted that the learned judge after having given due consideration to the defence available to the bank under s. 73A of the BEA 1949 had accepted the evidence of PW1, PW2 and PW6 that the plaintiff had in place a sufficient 'control system' for the monitoring of the cheques and bank monthly statements as a fact. There was therefore no negligence on the part of the plaintiff in the matter.

A Our Decision

[41] Before us there were basically two issues that called for our consideration. They were:

- B** (a) Whether the learned judge's finding that one of the two signatures on the impugned 196 cheques was a forgery was sustainable on the evidence and in law; and
- C** (b) Whether the learned judge had correctly interpreted the scope and extent of the defence available to the bank under s. 73A of the BEA 1949 (a question of law) and in any event, whether the finding that the plaintiff had in place a sufficient control system for the monitoring of cheques and monthly bank statement of accounts was sustainable on the evidence before the court.

Forgery

- D** [42] After due consideration of both, the material before us and submission of respective counsel, we were unanimous that the learned judge's deliberation and conclusions reached on the issue of forgery of one of the two signatures on the impugned cheques was correct on the facts and sustainable in law. We were not inclined therefore to interfere with that part of the decision.

- E** [43] The learned judge had undertaken an examination of the disputed signatures (though only stated as a 'cursory checking') as against the available specimen signatures of Director C and Director N. The learned judge was perfectly entitled to embark upon that course under s. 73(1) of the Evidence Act 1950 which provided:

- F** 73. Comparison of signature, writing or seal with others admitted or proved.

- G** (1) In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal, admitted or proved to the satisfaction of the court to have been written or made by that person, may be compared by a witness or by the court with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

- H** The comparisons by the court were made as against the proved signatures available on the 'specimen signature cards' and the 'signature scanner form'.

- I** [44] Further it should be noted that the learned judge did not just rely on His Lordship's own conclusion on the variances noticeable in respect of the alleged 'forged' signatures but also placed much emphasis on the admission of the bank's own witnesses DW2 to DW18 under cross-examination as to the obvious differences and discrepancies in all the forged cheques, as set out in the parts of the learned judge's decision reproduced at paras. 24 and 25 above.

[45] As also noted by us above, the learned judge also cautioned himself not to merely accept the denial of Director N (PW1) and Director C (PW2) as to their respective challenged signatures.

A

[46] In our view, the finding of the learned trial judge based on a comparison of the disputed signature with admitted documents was sufficient to conclude on a balance of probabilities that all the 196 impugned cheques were forgeries and the bank ought not to have honoured any of them for payment from the plaintiff's account.

B

[47] Having so affirmed that part of the decision, which held that the disputed signatures were forgeries, we did not find it necessary to make any specific finding that the learned trial judge was correct or not in holding that:

C

- (a) The use of what was described by the learned judge as a 'non-mandated company chop' was tantamount to a forgery of a 'signature'; and
- (b) The alteration to the 'cheque-book requisition slip' required similar verification or authentication as was required in the case of cheques drawn on the plaintiff's bank account.

D

Accordingly those issues are best left to another occasion for a conclusive ruling.

Section 73A BEA 1949 - Defence Open To The Bank

E

[48] On this issue, we were however unanimous that the learned judge was clearly in error both on the law and on an objective evaluation of the facts to hold that the bank could not avail itself to the defence, namely of 'knowingly or negligently' contributing to the forgery as was now available under s. 73A of the BEA 1949 (introduced in 1997).

F

[49] Although the learned judge correctly acknowledged that the burden was on the bank to prove that the plaintiff had knowingly or negligently contributed to the forgery, the learned judge was more inclined, in our analysis of His Lordship's grounds of decision, to be somewhat still restricted to the 'common law' position and previously prevailing considerations. Hence in the application of the law to the facts obtaining in this case the learned judge was erroneously led to conclude that the plaintiff had 'checked (read) the bank statements' and in any case the terms and condition of operating the account (specifically to notify errors within 14 days) would only be binding if it had been specifically brought to attention of the customer.

G

H

The focus of the learned judge was far removed from the critical issue, namely, whether the plaintiff had provided for adequate control system to prevent forgeries and fraud within its own operations.

I

[50] The following excerpts from the judgment of the learned judge was sufficient to bear out this wrong approach adopted by the trial court in coming to the aforesaid conclusion.

- A The first issue for the Court to decide is the effect of Section 73A BEA on the fundamental contractual relationship established by common law that the bank is only mandated to debit the account of the customer when that instruction is validly given in the form of a signature. It appears to the Court on a reading Section 73A BEA that it has modified this to say
- B that even if the instruction or signature is forged, the bank has authority now to act on the forged signature by the section expressly providing that a forged signature will be deemed to be an authorised signature if the bank can show the customer was in default through knowledge or negligence.
- C The next issue arising is whether by the wording of Section 73A BEA, the common law duty that a customer does not owe a duty to read bank statements has been abrogated? Can a banker who can now establish that the customer in not reading his bank statements has been negligent or in contractual breach to escape liability for the bank in not acting in accordance with the customer's mandate? *Can this indirect and roundabout way without clear words of repeal be used to impose a duty on the customer to read*
- D *his bank statements thereby abrogating the consumer protection given to customers established and maintained over the years under common law? The above cited authorities had decided affirmatively that in common law it was never negligence not to read bank statements since no duty of care was owed in law and that any contractual clause like paragraph 2.13.2 of the Defendant's Terms and Conditions of Operating a Current Account (Ex DSOB-2-3) will be construed strictly. Further the law was that a conclusive evidence clause was not effective if it had not been specifically brought to the attention of the customer. It would appear to this Court that it will be bound by the RHB Bank case (supra) to hold that a contractual duty to read bank statements will today on such failure amount to an act of negligence for the purposes of affording protection to banks under Section 73A BEA.*
- E
- F Applying *RHB Bank case (supra)* to the facts here, the Court would hold that paragraph 2.13.2 of the Defendant's Terms and Conditions of Operating a Current Account (Ex DSOB-2-3) cannot apply to the facts here simply because the Plaintiff had shown compliance with it through the application of their control system. *It was not the Plaintiff's failure to check*
- G *their bank statements and report errors within the 14 days that caused the loss. Rather it was their inability to get hold of the genuine statements to check that had cause the non-reporting of errors through the fraud committed by the Manager by his scheme of using forged checks which were omitted from the fabricated statements that were received, checked and tallied as correct by PW6 in K.L.*
- H
- I In other words a failure to check would be evidence of negligence or a breach as contemplated by paragraph 2.13.2 of the Defendant's Terms and Conditions of Operating a Current Account (Ex DSOB-2-3). The Plaintiff had shown that PW6 did check albeit on the fabricated statements in accordance with the control system, as such the Plaintiff had not been negligent or in breach of paragraph 2.13.2 of the Defendant's Terms and Conditions of Operating a Current Account (Ex DSOB-2-3) in not spotting the issue of the forged cheques that would not be disclosed in the fabricated accounts received in their KL office.

The Court has found that the control system of the Plaintiff could not be faulted because of the fraud committed by the Manager and in turn the Court will find that the purported exemption from liability that the Defendant seek through application of paragraph 2.13.2 of the Defendant's Terms and Conditions of Operating a Current Account (Ex DSOB-2-3) as not effective against the Plaintiff's claim for reimbursement for the forged cheques since the Plaintiff had a system of checking under their control system but were misled by the fabricated statements. (emphasis added)

A

B

[51] The learned judge, with respect, seem to confine himself to the defences available in common law and the bounds of the contractual terms in a bank-customer contract.

C

[52] The law on s. 73A of the BEA 1949 has now been authoritatively clarified and emphasised in various decisions of our courts. It is necessary to first recall the scope and reach of this statutory defence now open to the bank.

D

Section 73A reads:

73A. Notwithstanding section 24, where a signature on a cheque is forged or placed thereon without the authority of the person whose signature it purports to be, and that person whose signature it purports to be knowingly or negligently contributes to the forgery of the making of the unauthorised signature, the signature shall operate and shall be deemed to be the signature of the person it purports to be in favour of any person who in good faith pays the cheque or takes the cheque for value.

E

[53] The material words in that provision, that begs emphasis for the defence to be availed of was - "... that person whose signature it purports to be knowingly or negligently contributes to the forgery or the making of the unauthorised signature ..." : The 'person whose signature it purports to be' in case of a corporate account holder (who acts through authorised signatories) would mean the customer of the bank (as was the plaintiff in our case).

F

G

The bank need only show that it had honoured the cheques in good faith. 'Good Faith' has in turn been defined at s. 95 of the BEA 1949 as "A thing is deemed to be done in good faith, within the meaning of the Act, where **it is in fact done honestly whether it is done negligently or not**". (emphasis added)

H

The Law Pre – s. 73A Amendment

[54] The law on forged cheques, prior to the amendments that introduced s. 73A to the BEA 1949, as succinctly summarised by Anuar J (as His Lordship then was) can be seen from the following extracts from the judgment of the Supreme Court in *United Asian Bank Bhd v. Tai Soon Heng Construction Sdn Bhd* [1993] 2 CLJ 31:

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- A Therefore, at common law a banker who pays out on a forged instrument drawn on his customer's account is absolutely liable to make good the loss. It is no answer for him to say that he was unaware of the forgery or that he took reasonable care. The forged instrument is a nullity and a banker has no authority, actual or implied, from his customer to act upon it. The common law has been codified in Section 24 of the Bills of Exchange Act 1949, which creates a limited exception in favour of a banker. (page 38)
- B
- ...
- C A consideration of the relevant authorities shows that at common law a customer owes his banker only two duties. The first is to refrain from drawing a cheque in such a manner as may facilitate fraud or forgery. The second is a duty to inform the bank of any forgery of a cheque purportedly drawn on the account as soon as the customer becomes aware of it. The first duty is laid down by the decision of the House of Lords in *London Joint Stock Bank Ltd v. Macmillan* [1918] AC 777 ('the MacMillan duty'). The second was laid down by the decision in *Greenwood v. Martins Bank Ltd* [1993] AC 51 ('the Greenwood duty') (page 40).
- D
- [55] After the introduction of s. 73A by the legislature some doubts lingered as to whether that new section was merely a codification of the two defences already existent and available in common law. A further controversy the courts were called upon to decide was whether s. 73A was intended merely to mitigate or reduce the damages payable by a defendant-bank in view of the contributory negligence of the customer or it had the effect to fully absolve the defendant-bank (complete defence) from its strict liability where it could be established that a customer had negligently contributed to the forgery which gave rise to the loss suffered by the customer.
- E
- F
- [56] The court in *Globelink Container Line (M) Sdn Bhd v. Bumiputra Commerce Bank Berhad* [2011] 1 LNS 414 took the position that s. 73A was a statutory enunciation of the common law duty on the plaintiff where forgery was concerned and could go only towards mitigating or reducing the damages recoverable by the plaintiff. A somewhat similar position seem to have been taken by the learned judge in *Leolaris (M) Sdn Bhd v. Malayan Banking Bhd* (unreported) where it was opined that even if the defendant could avail itself of the protection of s. 73A, it did not totally absolve the defendant-bank of liability to the customer on the basis (as explained there) that 'strict compliance with the mandate' was a fundamental term of the contract between the banker and the customer in all cases.
- G
- H
- [57] On the other hand, the decisions of the courts in *Principal Salute (M) Sdn Bhd v. RHB Bank Bhd* [2010] 5 CLJ 819, in *Malaysia Plastics Sdn Bhd v. United Overseas Bank (Malaysia) Bhd* [2012] 4 CLJ 997; [2012] 9 MLJ 336, in *Leolaris (M) Sdn Bhd v. RHB Bank Bhd* [2009] 10 CLJ 248, in *Public Bank Bhd v. Anuar Hong & Ong* [2005] 1 CLJ 289 and in *Formosa Resort Properties Sdn Bhd v. Bank Bumiputra Malaysia Bhd* [2010] 6 CLJ 530, all accepted and
- I

proceeded on the premise that with the introduction of s. 73A, a new and complete statutory defence was available to the banks when sued by customers for wrongful payment on forged cheques. (In *Formosa Resort Properties supra*, the court accepted that as a principle of law but on the evidence led before it held that the defendant-bank had not proved that the customer was negligent).

A

B

[58] It is pertinent to point out that my learned brother Abdul Wahab Patail JCA in *Melewar Apex Sdn Bhd v. Malayan Banking Bhd* [2007] 8 CLJ 579; [2007] 3 MLJ 687 was not inclined there to accept that s. 73A had the effect of creating a new or complete defence to the defendant-bank. This can be gleaned from the following extract from His Lordship's judgment:

C

35. A close perusal of s. 73A shows that the burden is upon the bank to prove the drawer had knowingly or negligently contributed to the forgery of the making of the unauthorised signature.

36. It is clear that s. 73A **was not a complete but was a qualified reversal of the previous law**, placing the burden upon the bank to prove that the drawer:

D

(a) had acted knowingly or negligently; and

(b) thereby contributed

(i) to the forgery; or

E

(ii) the making of the unauthorised signature.

(emphasis added)

[59] Nevertheless, my learned brother in the aforesaid decision in *Melewar Apex (supra)* did not rule out that a duty of care could be imputed to a plaintiff to employ a trusted employee and oversee the employee in situations where the employee is authorised to sign cheques on behalf of the employer. This was adequately borne out from the following passage of the judgment:

F

(33) With respect, it does not follow that because **an employee is authorised to prepare the cheques** for signature of the employer, the employer must keep, over and above the general supervision over employees, a close supervision over that employee. The statement by the learned author did not appear to have addressed this point which is apparent in *Tai Hing Cotton Mill Ltd v. Liu Chong Hing Bank Ltd & Ors*. **It might be a different if that employee were authorised to sign the cheques for the employer.**

G

(emphasis added)

H

[60] My learned brother Hamid Sultan JCA in *Leolaris (M) Sdn Bhd v. Bumiputra Commerce Bank Bhd* [2012] 6 CLJ 423, it must also be mentioned was of the view that s. 73A had brought in a wider concept of duty requiring a customer to take reasonable precautions in the management of his business to prevent forgery. It was in that judgment noted as follows:

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- A (f) Section 73A totally does not oust the common law position. If Parliament intended that it would have expressly stated so. The protection afforded to the customer at common law is still sustainable but with some restrictions. For example: (i) if a cheque has been forged the bank is liable (this part may relate to negligence); (ii) if the bank sends statement on monthly basis and
- B the customer does not identify the discrepancy in the first, second or third month etc (this is where the phrase 'negligently contributes' become operative), and allow the state of affairs to continue depending on the facts of each case, the bank may be able to rely on the statutory defence in respect of the relevant transaction provided it can satisfy the requirement set out in the section. *It is not negligence per se that attaches liability but negligent contribution which causes the loss provides the defence reversing the common law position.*
- C In essence, a customer who is vigilant in checking the bank statement regularly need not fear if the cheque has been forged provided he complains within a reasonable time to arrest the continuing forgery. (emphasis added)
- D

More significantly, my learned brother Hamid Sultan JCA went on to state:

- E I must say here again the Act says 'negligently contributes' and it must not be taken to read as contributory negligence. The difference is like apple and orange. *Contributory negligence relates to sharing of liability. On the other hand, 'negligently contributes' relates to promoting a negligent act, or its like.* If the bank can show that there was in fact negligent contribution on the part of the customers taking into consideration the circumstances of the case and the bank had paid out in good faith, the section will provide **an absolute defence to a customer's claim** in respect of the relevant transaction.
- F (emphasis added)

- G [61] A similar position in law was adopted by the Court of Appeal in the recently issued judgment in *Prima Nova Sdn Bhd v. Affin Bank Bhd* [2014] 9 CLJ 442. This court has now affirmed the position taken by previous judgments that the legislative intent behind the introduction of s. 73A was to impose a wider duty of care on customers of a bank.

- H [62] It was axiomatic that the answer in any case to the question whether the customer, was liable to have 'negligently contributed' to the forgeries, would be very much dependant on the particular and peculiar facts of each case.

- I [63] In *Leolaris (M) Sdn Bhd v. RHB Bank Bhd* [2009] 10 CLJ 248, s. 73A was invoked and was accepted as absolving the bank of liability. Ramly Ali J (as His Lordship then was) observed there as follows:

[22] Juliana Siew, the person who is alleged to have committed the forgery/fraud was at all material times an employee/officer of the plaintiff. The court is of the view that the said forgery/fraud (if at all) was contributed by the plaintiff's own negligence. It was the duty of the plaintiff to do the following in respect of the account and Julianna Siew:

- (a) to supervise Siew and monitor her duties as the plaintiff's accountant/corporate administrator; A
- (b) to conduct checks on the plaintiff's cheque books which was issued by the defendant and check all the banking transactions carried out with the defendant on a regular basis.
- [23] The court is also of the view that the plaintiff was in breach of the above mentioned duties and therefore was negligent in that: B
- (a) failing to supervise or properly supervise Siew at all material times;
- (b) failing to ensure that Siew carried out her duties honestly and in good faith; C
- (c) failing to conduct check or any regular checks on the utilization of the issued cheque books;
- (d) entrusting the custody of issued cheque books to Siew and entrusting the operation of the banking transaction entirely to Siew; D
- and
- (e) failing to take any care and caution or any proper care and caution as regard to their monies.
- [24] The evidence clearly shows that: E
- (a) Siew was entrusted with the keeping of the cheque books and a fair number of administrative matters of the plaintiff's office. She is also the officer manager and reviewed invoices from creditors and sign all payment vouchers. She also prepared cheque;. F
- (b) no one actually supervises Siew's work;
- (c) ...
- (d) ...
- (e) ... G
- (f) ...
- [64] That the duty of care expected of a customer of a bank did extend to cover proper control and supervision of critical staff, to put in place appropriate procedures as to access to cheque books and also entailed periodic checking of one's account with the bank was commented upon by the court in *Public Bank Bhd v. Anuar Hong & Ong (supra)* in the following words (although it would appear that in that case s. 73A was not specifically cited): H
- The respondent, as employer, appeared to have been rather lax in exercising its supervision in respect of its financial affairs. In my considered opinion to supervise their financial clerk SP3 only once in three I

- A months after the initial period was inadequate. The respondent had clearly failed to exercise due care in protecting their own interest from any misconduct of their own employees.

- [65] In the case of the present appeal before us there was no serious divergence on the surrounding facts related to the plaintiff's operation of its financial matters and bank accounts generally and more specifically at its Bintulu office.

- B The forgeries of the 196 disputed cheques took place over a period of over four years (2002 to 2006). These cheques were encashed through the plaintiff's account with the bank and went undetected by the plaintiff over that prolonged period. Patently, there was no system in place at the plaintiff's side to protect its monies in the relevant bank account.

- C [66] AR was left to solely manage the Bintulu office and had been given custody of the cheque books and to receive the monthly bank statements from the plaintiff. There was no doubt that the presence of even a single accounts clerk or other personnel at the Bintulu branch would have been an effective check against AR's excesses, as occurred here to the detriment of the plaintiff.

- D [67] PW6, was the plaintiff's part-time accounts executive who had been assigned the duties to monitor cheque transactions in respect of the plaintiff's account at Bintulu with bank. She was however based at the main office at Kuala Lumpur.

- E The monthly bank statements sent by the bank as noted earlier was required to be addressed to the Bintulu office only. The plaintiff ought to have required the monthly bank statements to be sent to their main office instead to safeguard its financial position knowing fully well that there was no other staff except AR in Bintulu. This blatant gap in the control or administrative set up of the plaintiff left a ripe opportunity for AR to orchestrate and carry out that fraud on the plaintiff over that long period of four years.

- F [68] It was further in evidence that the plaintiff had in December 2005 discovered some discrepancy in respect of the operation of their account held with the bank. Yet the plaintiff did not put a stop to the operations immediately and commence investigations on their own earlier when there was a hint of possible irregularity. This failure on the part of the plaintiff to protect its own interest resulted in a further 59 forged cheques (within the 196 cheques) to be fraudulently encashed for a further eight months up to August 2006.

- G The excuse given by the plaintiff that the bank only reverted to the plaintiff's request for copies of previous monthly bank statements, was not convincing or acceptable. The plaintiff had always the paramount duty to adequately protect its funds with the bank from being wrongfully taken out. It was not justifiable at all to shift the blame and just ignore the consequences despite being put on alert to such an irregularity.

I

[69] The learned judge, in our respectful view therefore, was only correct to the extent of identifying the actual source of the predicament faced by the plaintiff in what had happened over the four years during which the 'forgeries' went undetected. This was namely that the monthly bank statements sent dutifully by the bank to the Bintulu office of the plaintiff, had in fact been 'doctored' or 'fabricated' and thereafter forwarded to the main office at Kuala Lumpur by AR.

The learned judge was however plainly not being objective when His Lordship went on to further say that the plaintiff was nevertheless blameless as the plaintiff had no knowledge that the monthly bank statements they received had been 'fabricated'. In His Lordship's words, "... the plaintiff had a system of checking under their control system but were misled by the fabricated statements". We disagree that there was 'a system for checking' or any system at all in this case.

[70] The proper question that should have been asked and answered in the circumstances by the court, in our view, was whether the plaintiff was culpable in allowing or creating the opportunity and space for the monthly bank statements to be tampered with, as was the case here. The plaintiff obviously had failed to practice proper oversight and prudence with respect to their financial affairs which, to say at the least required the plaintiff to put into place appropriate internal control system for monitoring of operations of their monies in their account with the bank from time to time and to have adequate supervision and checks on the conduct of their employees entrusted with such responsibilities.

[71] There was also no evidence that the plaintiff had independently made periodic checks directly with the bank, (say quarterly, half-yearly or annually) either by themselves or through their internal or external auditors, to verify the balances in their account with the bank. The leakage of the plaintiff's monies could have been arrested if this had been done.

[72] Taken in its totality, there was no doubt in our mind that the negligent conduct, as exemplified by the omissions of the plaintiff enumerated above, was the direct cause that contributed to the 'forgeries' of the impugned cheques drawn on the plaintiff's account with bank and this continuing over those four years. The plaintiff had fallen victim to a fraud of its own employee on the facts of this case. Section 73A of the BEA 1949 was intended definitely, in our considered opinion to protect the bank in such instances as obtained here.

Conclusion

[73] Irrespective of whether s. 73A was a mere enactment of the common law defences available to the bank or it was only an extension of such defences in revised and wider terms or it was a complete or absolute defence, the evidence before the trial court was that it was plaintiff's acts of neglect and omissions that contributed directly to the forgeries of the cheques and

A the consequential losses suffered by the plaintiff. The learned judge erred in ignoring or watering down those indisputable facts or such inferences of fact that were to be drawn reasonably on the evidence placed before the court as a whole. This merited our appellate correction.

B [74] The trial court ought to have held that the bank had established a sufficient defence to the plaintiff's claims within the purview of s. 73A of the BEA 1949 and dismissed the action.

[75] For the reasons elaborated and discussed above, we were therefore constrained to allow the appeal.

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